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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 317

FRANK A. WHITTINGTON,
Petitioner,

against

MOORE-McCORMACK LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT MOORE-McCORMACK LINES, INC., IN OPPOSITION

JOHN P. SMITH,
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ALBERT P. THILL,
of Counsel.

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Opinions Below

No opinion was delivered in the District Court. The opinion of the Court of Appeals for the Second Circuit (R. 17-18) is reported at 196 F. (2d) 295. No opinion was delivered in the Court of Appeals in denying appellant's petition for rehearing.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered April 30, 1952 (R. 18-19). The order of the Court of Appeals for the Second Circuit on appellant's petition for a rehearing was entered June 10, 1952 (R. 29-30). The petition for writ of certiorari was filed September 5, 1952 and was served September 9, 1952. The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of 28 U. S. Code.

Question Presented

The sole question raised upon appeal is whether the petitioner's exclusive remedy for his injuries is under the Workmen's Compensation Law of New York.

Statute Involved

The New York Workmen's Compensation Law, Sections 10 and 11, as enacted pursuant to Article 1, Section 18 of the New York Constitution. The applicable provisions of this Law are set forth as follows:

> "§ 10. Liability for compensation. Every employer subject to this chapter shall in accordance with this chapter, * * *, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, * * *."
>
> "§ 11. Alternative remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, * * * at common law or otherwise on account of such injury * * *."

Statement

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit reversing a judgment of the District Court in favor of petitioner. The controversy was submitted to the District Court upon a stipulation of facts (R. 2-5).

Petitioner has attempted to paraphrase the stipulated facts (R. 6-7), and by so doing, has omitted certain pertinent facts; viz., that petitioner had been employed by respondent for approximately a year before the assault occurred (Stipulation of Facts, Paragraph 4); that the assault occurred on respondent's premises before he and Cooke reached the exit (Stipulation of Facts, Paragraphs 13 and 16). The stipulated facts, fully set forth are:

1. The plaintiff, on the 20th day of September, 1950 was and still is a resident of the State of New York.

2. The defendant was a foreign corporation engaged in shipping. The defendant was the lessee of Pier 32, North River, New York. All operations incidental to shipping including freight handling were conducted at this pier.

3. The operation of the pier was under the direction of the defendant's terminal operator. Under the terminal operator was the superintendent of the pier, a Mr. Kane. Under Mr. Kane were the various dock bosses, which included the stevedore boss for the longshoremen and one Arthur Cooke who was the dock boss for the checkers.

4. The plaintiff was a checker in the employ of the defendant on September 20, 1950 and he had been so employed since September 1949. Plaintiff's work consisted of checking freight upon the pier under the direct supervision of Arthur Cooke, the dock boss in charge of checkers.

5. Cooke's duties consisted of employing the checkers needed to perform the daily work connected with the loading and unloading of vessels and in assigning the checkers to their various duties and locations.

6. Cooke had the authority to bind his employer, the defendant herein to contracts of hire for checkers only.

7. The checkers selected and employed by Cooke each morning would sign the timekeeper's book and punch the clock.

8. The plaintiff would "shape up" each morning unless he had been told on the previous day that there was work for him on the following day. The "shape up" consisted of reporting at the pier gate in order to determine if there were vessels ready for loading or unloading.

9. On the 20th day of September, 1950 the plaintiff proceeded with his customary duties until approximately 4:00 P. M. when a "work distributor" under Cooke instructed the plaintiff to complete the checking of a certain truck and to work overtime, if necessary, in order to complete the truck.

10. Under the custom the regular hours of employment were from eight o'clock in the morning until five o'clock in the afternoon, and overtime, if necessary, at an additional hourly rate. On September 20, 1950 the plaintiff worked overtime until approximately twenty minutes before 6:00 P. M., then went over, punched the clock and checked out.

11. After leaving the clock the plaintiff met Cooke who asked him why he was leaving the job while there were still other trucks to be checked.

12. The plaintiff and Cooke walked away from the clock toward the gate at the pier exit and during this time Cooke demanded that the plaintiff return to work.

13. Before they reached the exit and while on defendant's premises the plaintiff and Cooke stopped walking and faced each other.

14. The plaintiff put his hands into his pockets for a cigarette and the next thing he knew he was in a hospital.

15. For the purposes of this trial only the defendant will concede without admitting the truth thereof that Walter J. Grady, 104-22 123rd Street, Richmond Hill, New York and Michael Gorham, 120 West 64th Street, New York City, if called as a witness for the plaintiff would testify that they heard Cooke say to the plaintiff in a loud voice: "Who in hell do you think you are. Get back and punch the clock." They thereupon heard the plaintiff say to Cooke: "I am going home." They then saw Cooke hit the plaintiff with his right hand and the plaintiff fell striking his head on the corner of the concrete walk. They saw that the plaintiff was unconscious and had his hands in his pocket. The plaintiff was removed by ambulance to St. Vincent's Hospital.

16. Cooke and the plaintiff were on the defendant's premises when the blow was struck.

17. For the purposes of this trial it is conceded that Cooke struck the plaintiff because the latter refused to return to work.

18. It is conceded by the plaintiff that Cooke was never authorized by Kane, his supervisor, or anyone else in the employ of Moore-McCormack to strike or assault the plaintiff or anyone else.

19. The defendant carried adequate and appropriate compensation insurance against accidents arising under the Compensation Act and complied with the Workmen's Compensation Act in every respect.

New issues, totally unrelated to the issues raised by the stipulated facts, are presented by petitioner.

Petitioner argues that he was subjected to involuntary servitude, yet no such fact is contained in the agreed statement of facts. There is no stipulated fact that petitioner was forced by respondent to return to work or that Cooke assaulted petitioner in attempting to compel petitioner to return to work. There is no stipulated fact that petitioner refused to be employed. He had been employed that day and for about a year prior to the assault by respondent. He was assaulted because he refused to return to work (R. 4).

Petitioner contends that the decision of the United States Court of Appeals conflicts with the decisions of the New York Court of Appeals. There is no conflict. The New York Law was properly applied to the facts as stipulated.

But one issue is presented here: That the New York law had been properly applied to all of the facts set forth in the stipulation of facts so as to limit petitioner to his remedy to the benefits under the Workmen's Compensation Law.

POINT I

Petitioner's sole remedy against respondent is under the New York Workmen's Compensation Law.

An employee's exclusive remedy for accidental injuries arising out of and in the course of employment in the State of New York is governed by the New York Workmen's Compensation Law (Section 11).

Injuries sustained by an employee when assaulted by a fellow employee are "accidental injuries" within the meaning of the Workmen's Compensation Law.

In considering an assault by a foreman, the Court in *Matter of Knocks* v. *Metal Packing Co.,* 231 N. Y. 78, at page 82 said:

> "The injury to the claimant's eye was not designed, intended or expected. It was an unlooked-for and untoward event and an accident within the meaning of the act. * * * "

In *Mazzarado* v. *Levine and Davega-City Radios, Inc.,* 274 A. D. 122, a case similar to the case at bar, the employer's motion for summary judgment dismissing the complaint was granted. Plaintiff brought an action against his employer for injuries sustained as a result of an assault by defendant Levine, manager of the employer's store in which plaintiff worked. The employer pleaded the Workmen's Compensation Law as a complete defense and moved for summary judgment dismissing the complaint. Plaintiff's attorney, in opposition to the motion, asserted that the assault had nothing to do with the work in which Levine was engaged at the time of the assault and that the assault did not arise out of and in the course of plaintiff's employment. The Court wrote at page 124:

> "Despite the shifting positions of the plaintiff as alleged in the complaint and affidavit of his attorney aforesaid it is at least clear on this record that the plaintiff claims to have been the victim of an unprovoked assault by a fellow employee while engaged in the repair of radios in the course of his employment."

At page 126:

> " * * * On the present record it is our view that the plaintiff has no cause of action for damages against Davega whether or not the assault arose out of his employment. Of course, it is clear that the plaintiff's injuries would be compensable as an industrial accident if they arose out of his employment. In that case compensation would be the sole remedy against the employer. (Workmen's Compensation Law, § 11). * * * "

At page 127:

> "* * * The Workmen's Compensation Law deals with accidental injuries, and not with intentional wrongs. The commission of an assault by one employee upon another in the course and arising out of the employment may properly be deemed accidental from the standpoint of the employer as an untoward event not expected or intended. * * *"

Accordingly in the instant case, based upon the conceded facts, the plaintiff Whittington sustained accidental injuries and from the standpoint of the defendant Moore-McCormack Lines, Inc. the assault and the injuries resulting therefrom are deemed accidental since the defendant did not instigate nor direct the assault.

Accidental injuries sustained on the premises of an employer before an employee starts work or after he completes his work for the day arise out of and in the course of employment and are covered under the New York Workmen's Compensation Law.

The general rule in workmen's compensation cases, is stated in *Matter of Kowalek* v. *N. Y. Consolidated R. R. Co.*, 229 N. Y. 489, 492, as follows:

> "It is a general rule that if an employee is injured on the premises of the employer in going, with reasonable dispatch and method, to or from actual performance of the specific duties of the employment by a way provided by the employer or reasonably used by the employee, compensation must be awarded. The going to and from the actual work and the risk involved in it are reasonably incidental to the employment."
>
> *Matter of Lynch* v. *City of N. Y.*, 242 N. Y. 115;
> *Matter of Manville* v. *State of N. Y.*, 294 N. Y. 1.

The same rule is applied in a common law action by an employee against the employer. In the case of *Martin* v. *Metropolitan Life Ins. Co.*, 197 A. D. 382, affirmed 233 N. Y. 653, plaintiff sued her employer for negligence.

Plaintiff worked on the 11th floor of the employer's building. During her luncheon hour, she went down on one of the passenger elevators on a personal errand and was injured as she was about to leave the elevator. Since the employer was bound to furnish a safe entrance and exit from its premises, it was held that the plaintiff was covered by the Workmen's Compensation Law and could not recover in an action for negligence.

To the same effect is the case of *Bodie* v. *N. Y. & Queens E. L. & P. Co.*, 240 A. D. 856, affirmed 264 N. Y. 556. The memorandum decision of the Appellate Division reads in part as follows:

> "Judgment reversed on law and complaint dismissed with costs. Plaintiff, one of defendant's employees, claims to have been injured as a result of a fall down a flight of steps in defendant's building where she was employed, which steps it is alleged were unsafe. * * * Plaintiff's claim is that, while her employment began at nine o'clock in the morning, she arrived in the defendant's building at eight-thirty o'clock, intending first to pay an electric light bill and afterwards to report to work. She fell while entering the building. One of the defenses established is that defendant had secured its employees, including plaintiff, compensation for injuries arising out of and in the course of employment pursuant to the provisions of the Workmen's Compensation Law. The sole question of law is whether plaintiff's intent to pay her electric light bill before reporting for work takes this case out of the category of the cases arising under the Workmen's Compensation Law for injuries sustained while in the course of her employment, and renders the defendant liable in a common-law action. We think not. * * * "

Likewise in the case at bar, based upon the conceded facts, plaintiff Whittington was covered by the New York Workmen's Compensation Law since his accidental injuries were sustained upon the defendant's premises even though he had punched the clock and checked out.

The same rule has been applied by this Court in *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154 and *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418.

In view of the foregoing authorities, plaintiff's sole remedy for the accidental injuries which he sustained as a result of the assault is under the New York Workmen's Compensation Law and since the defendant carried adequate workmen's compensation insurance and had complied with the Workmen's Compensation Law in all respects, a common law action in negligence for said injuries cannot be maintained against the defendant.

Pursuant to the rule in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, the statutory and case law of New York is applicable and decisive of the issues herein.

There was no question of fact to be determined by the District Court. For this reason, the cases cited by petitioner (p. 50, Brief) do not apply. Those cases apply only where there are controverted issues of fact.

DeCoigne v. *Ludlum Steel Co.*, 251 A. D. 662; *Lavin* v. *Goldberg Building Material Corp.*, 274 A. D. 690, and *Heskett* v. *Fisher Laundry & Cleaners Co., Inc.*, 217 Ark. 350 (p. 54, Petitioner's Brief) involved determinations of the sufficiency of complaints which alleged that the employer committed the assault. They are inapplicable to the case at bar.

Nor was there a violation of any of petitioner's constitutional rights by the respondent. Petitioner has stipulated that respondent did not authorize this or any other assault (R. 5). Respondent cannot be held to have coerced petitioner into involuntary employment through an act which it did not authorize. The Constitution places no such onerous duty on an employer.

Petitioner is not without remedy. He is entitled to workmen's compensation benefits under the New York Workmen's Compensation Act.

POINT II

The petition and brief of petitioner present no issues reviewable by this Court.

No constitutional questions are involved under the stipulated facts. These stipulated facts negative any such question.

There is no conflict between the decision of the Court of Appeals for the Second Circuit and the decisions of the New York Court of Appeals applying the Workmen's Compensation Law of New York to the stipulated facts.

The decision of the Court of Appeals for the Second Circuit is correct.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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